

THOMAS GLEN GARNER

APPELLANT

VS.

FILED

NO. 2007-CP-0600

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SUPREME COURT
COURT OF APPEALS**

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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THOMAS GLEN GARNER

APPELLANT

VERSUS

NO. 2007-CP-0600

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR APPELLEE

STATEMENT OF THE CASE

In October 2004, Thomas Glen Garner pleaded guilty in the Circuit Court of Forrest County to a charge of aggravated assault and was sentenced to a term of ten years in the custody of the Mississippi Department of Corrections, suspended on three years post-release supervision. (T.249-50) On December 20, 2005, the circuit court found that Garner had violated the terms of his post-release supervision in that he tested positive for the presence of crystal methamphetamine in his urine. Accordingly, his post-release supervision was revoked and he was order to serve the 10-year sentence. (T.249-50) Thereafter, Garner filed in the circuit court a Motion for Post-Conviction Collateral Relief/Clarification of Sentence, which the court summarily dismissed. (C.P.6, 248-53) Aggrieved by the judgment rendered against him, Garner has perfected an appeal to this Court.

relief was plainly devoid of merit. Accordingly, the circuit court properly dismissed the motion without a hearing. The judgment entered below should be affirmed.

PROPOSITION:

**THE CIRCUIT COURT DID NOT ERR IN DISMISSING GARNER'S
MOTION FOR POST-CONVICTION COLLATERAL RELIEF
WITHOUT A HEARING**

In his motions for post-conviction collateral relief filed in the circuit court, Garner claimed that the suspension of his sentence was illegal because of his prior felony conviction, and that he received ineffective assistance of counsel. (C.P.6-15, 250) These were the only claims presented to the circuit court, and they are the only issues properly before this Court. *Rivers v. State*, 807 So.2d 1280, 1281 (Miss.App.2002); *Patterson v. State*, 594 So.2d 606, 609 (Miss.1992); *Gardner v. State*, 531 So.2d 805, 808-09 (Miss. 1988).

The circuit court's dismissal of Garner's motion is not subject to reversal absent a finding that it is clearly erroneous. *Taylor v. State*, 766 So.2d 830, 832 (Miss. App. 2000), citing *Kirksey v. State*, 728 So.2d 565, 567 (Miss.1999). The state submits the court's ruling is supported by the record and applicable case law.

First, Garner may not be heard to complain of having received a sentence more lenient than the one to which he was entitled. *Jefferson v. State*, 958 So.2d 1276, 1278-79 (Miss. App. 2007), and cases cited therein. A defendant "cannot stand mute when he is handed an illegal sentence which is more favorable than the legal sentence would have been, reap the benefits of that illegal sentence, and later claim to have been prejudiced as

requires no extended discussion. The circuit court properly dismissed this claim without a hearing.

Next, the state submits Garner's challenge to the effectiveness of his counsel is supported by no affidavit other than his own and is belied by the unimpeachable documentary evidence, i.e., his own sworn testimony during the plea colloquy. The transcript of that hearing shows that Garner swore that he was satisfied with the services of his attorney; that he believed that his attorney had properly advised him and represented him in this case. (C.P.174) It follows that no hearing was required on this claim. *Buckhalter v. State*, 912 So.2d 159, 162 (Miss. App. 2005); *Gable v. State*, 748 So.2d 703, 706 (Miss. 1999). *Vielee v. State*, 653 So.2d 920, 922 (Miss.1995), citing *Brooks v. State*, 573 So.2d 1350, 1354 (Miss. 1990).

The state submits the circuit court properly dismissed Garner's facially meritless motion for post-conviction collateral relief. The judgment entered below should be affirmed.

was properly dismissed without a hearing. The judgment entered below should be affirmed.

Respectfully submitted,

**JIM HOOD, ATTORNEY GENERAL
STATE OF MISSISSIPPI**

A handwritten signature in black ink, appearing to read "Deirdre McCrory", written in a cursive style.

BY: DEIRDRE McCRORY
SPECIAL ASSISTANT ATTORNEY GENERAL


do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of
the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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Circuit Court Judge
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This the 3rd day of April, 2008.


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